(8)

No. 92-1500

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

PAUL CASPARI, , SUPERINTENDENT OF THE MISSOURI EASTERN CORRECTIONAL CENTER, AND JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI ..... *Petitioners*

VS.

CHRISTOPHER BOHLEN ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE AMICI CURIAE THE STATES OF ARKANSAS, CONNECTICUT, DELAWARE, IDAHO, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, SOUTH CAROLINA, AND WYOMING IN SUPPORT OF PAUL CASPARI, SUPERINTENDENT OF THE MISSOURI EASTERN CORRECTIONAL CENTER, AND JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI

WINSTON BRYANT
Attorney General of Arkansas

BY: CLINT MILLER
Senior Assistant Attorney General
and KYLE R. WILSON
Assistant Attorney General
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, ARKANSAS 72201
(501) 682-3657

Attorneys for Amici

JOHN M. BAILEY
Chief State's Attorney
STATE OF CONNECTICUT
340 QUINNIPIAC STREET
WALLINGFORD, CT 06492
(203) 265-2373

CHARLES M. OBERLY, III
Attorney General of Delaware
DEPT. OF JUSTICE
820 N. FRENCH STREET
WILMINGTON, DE 19801
(302) 577-2500

LARRY ECHOHAWK
Attorney General
STATE OF IDAHO
STATE HOUSE
BOISE, ID 83720
(208) 334-2400

MIKE MOORE
Attorney General of Mississippi
P.O. BOX 220
JACKSON, MS 39205
(601) 359-3680

JOSEPH P. MAZUREK
Attorney General of Montana
215 N. SANDERS
HELENA, MT 59620
(406) 444-2026

DON STENBERG
Attorney General of Nebraska
STATE CAPITOL
P.O. BOX 98920
LINCOLN, NE 68509
(402) 471-2682

FRANKIE SUE DEL PAPA
Attorney General of Nevada
HEROES' MEMORIAL BLDG.
CAPITOL COMPLEX
CARSON CITY, NV 89710
(702) 687-3510

CAROL HENDERSON
Deputy Attorney General
DIV. OF CRIMINAL JUSTICE
APPELLATE BUREAU
CN 086
25 MARKET STREET
TRENTON, NJ 08625
(609) 984-4804

T. TRAVIS MEDLOCK
Attorney General of South Carolina
P.O. BOX 11549
COLUMBIA, SC 29211
(803) 734-3970

JOSEPH B. MEYER
Attorney General of Wyoming
123 STATE CAPITOL
CHEYENNE, WY 82002
(307) 777-7841

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES

CASES — Page

OTHER AUTHORITIES

No. 92-1500

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STATEMENT OF THE INTEREST OF THE AMICI CURIAE

Amici curiae are states with capital punishment statutes and/or statutes that set forth the procedure to be followed in sentencing habitual or persistent offenders. Amici support the position of the petitioners, Paul Caspari, Superintendent of the Missouri Eastern Correctional Center, and Jeremiah

W. (Jay) Nixon, Attorney General of Missouri, regarding whether this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981), was correctly decided. In *Bullington*, the Court applied the Fifth and Fourteenth Amendments' Double Jeopardy Clause to death penalty sentencing procedure. Amici contend that *Bullington* was incorrectly decided and that this Court should use the instant case to reconsider whether the Double Jeopardy Clause applies to capital sentencing decisions. In the alternative, the amici contend that this Court should limit its holding in *Bullington* to death penalty cases involving statutory sentencing procedures identical to those at issue in *Bullington*.

In the decision below, *Bohlen v. Caspari*, 979 F.2d 109 (8th Cir. 1992), the United States Court of Appeals for the Eighth Circuit relied on *Bullington* in applying the Double Jeopardy Clause to a sentencing decision in a non-capital case. The sentencing issue in *Bohlen* was whether respondent Bohlen was subject to, on retrial after remand, an enhanced sentence as a persistent offender after having successfully attacked on direct appeal the sufficiency of the State's proof of his status as a persistent offender at his initial trial. If this Court uses the instant case as a vehicle to extend its holding in *Bullington* to successive non-capital sentencing enhancement proceedings, then the amici and other states that have non-capital sentence enhancement procedure similar to the capital sentence proceedings in *Bullington* will be prohibited by former jeopardy principles from seeking enhancement of an habitual offender's sentence on remand after reversal of the defendant's sentence on the basis that the state failed to prove beyond a reasonable doubt the defendant's status as an habitual or persistent offender.

Prior to this Court's decision in *Bullington* this Court

never applied the Double Jeopardy Clause to sentencing in criminal cases. The amici contend that the values the Double Jeopardy Clause protects are not infringed by permitting successive sentencing proceedings. Therefore, if this Court's decision in *Bullington* is not reversed, the amici will continue to be barred in criminal cases by the Fifth and Fourteenth Amendments' Double Jeopardy Clause from seeking a death sentence or an enhanced sentence at retrial on remand after the defendant wins a post-conviction attack on the sufficiency of the state's proof of his status as an habitual offender or on the sufficiency of the state's proof that the defendant merits a death sentence.

SUMMARY OF ARGUMENT

With regard to whether this Court should affirm the decision of the United States Eighth Circuit Court of Appeals in *Bohlen v. Caspari*, 979 F.2d 109 (8th Cir. 1992) and thereby expand this Court's former jeopardy holding in *Bullington v. Missouri*, 451 U.S. 430 (1981), to cover non-capital sentencing procedure for habitual or persistent offenders, the amici respectfully submit that this Court should not do so. This Court should not do so because such an expansion of the ambit of the Double Jeopardy Clause will operate to the long-term detriment of defendants charged with being habitual or persistent offenders in those states where, by operation of statute, the state must prove the defendant's status as an habitual offender by proof beyond a reasonable doubt. Such proof, nor any other burden of proof, is not required by the Fourteenth Amendment's Due Process Clause. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91-3 (1986).

That some state statutes require the state to prove a defendant's status as an habitual offender beyond a reasonable doubt is a benefit to such defendants because proof beyond a reasonable doubt is the highest standard of proof imposed on the state in a criminal case. This standard protects accused habitual offenders at trial and on retrial. States that confer this statutory benefit on defendants will withdraw it if this Court expands the ambit of the Double Jeopardy Clause to non-capital sentence enhancement procedures. States that require, by statute, the state to prove a defendant's status as an habitual offender by proof beyond a reasonable doubt will amend these statutes in order to impose a lower burden of proof, or no burden of proof at all, and thereby escape the Double Jeopardy bar to the resentencing of habitual offenders

who succeed in post-conviction attacks on the sufficiency of the state's proof at their initial trials of their status as an habitual offender. *Cf. Tibbs v. Florida*, 457 U.S. 31, 45 n.22 (1982). State lawmakers will react to this Court's expansion of the Double Jeopardy Clause by making the statutory amendments, noted above, in order to protect ". . . the public interest in insuring that justice is meted out to offenders." *United States v. Scott*, 437 U.S. 82, 92 (1978). What the Fourteenth Amendment's Due Process Clause does not demand of the states in habitual offender sentencing — proof of the defendant's status beyond a reasonable doubt — the states will not give away to the Fifth and Fourteenth Amendments' Double Jeopardy Clause.

As to whether this Court should overrule its holding in *Bullington*, amici respectfully submit that the Double Jeopardy Clause was incorrectly applied to capital sentencing proceedings in *Bullington* for several reasons. First, the applicability of the Double Jeopardy Clause should not depend on the procedures employed in sentencing. The majority of this Court in *Bullington* applied the Double Jeopardy Clause to capital sentencing proceedings in part because the statutory characteristics of a capital sentencing proceeding resembled the guilt/innocence phase of a criminal trial. However, this Court has repeatedly held that the possibility of a higher sentence is a legitimate concomitant of the retrial process in non-capital proceedings. Given the number and magnitude of substantive and procedural safeguards mandated by the Eighth and Fourteenth Amendments, the sentence of death should not be treated differently for former jeopardy purposes than any other statutorily authorized sentence.

Second, the applicability of the Double Jeopardy Clause should not turn on the procedures employed in sentencing

because the individual states are constitutionally permitted to enact unique procedures governing capital sentencing proceedings. The Double Jeopardy Clause should receive an equally flexible application with regard to sentencing in death penalty cases.

Third, even if the applicability of the Double Jeopardy Clause turns on the specifics of the procedures employed, the mere presence of uniform standards or factors, such as aggravating and mitigating circumstances and the statutorily mandated weighing process, should not be dispositive of the issue. The mere presence of standards employed to channel the jury's discretion should not in and of themselves trigger the application of the Double Jeopardy Clause.

Finally, a jury's refusal to impose a death sentence does not necessarily indicate a failure of the state's proof. In *Bullington*, the jury was instructed that it had the discretion to reject a death sentence even if it found an existence of overwhelming aggravating circumstances which outweighed all evidence offered in mitigation and justified a sentence of death. This sentencing option negates the *Bullington* majority's reasoning that the jury's selection of a life sentence proves that the state failed to put before the jury sufficient evidence to warrant a death sentence. There are situations when the majority opinion in *Bullington* would prohibit resentencing when there was no failure of the state's proof that the defendant deserved a death sentence.

While a sentence of death is irrevocable, it should be no different than any other sentence in the context of the Double Jeopardy Clause. The States should not be precluded from seeking a sentence of death on retrial when the penalty phase of the first trial resulted in a life sentence or a death sentence that was reversed on appeal or in a post-conviction proceeding for lack of sufficient evidence.

ARGUMENT

I.

WHETHER THE DOUBLE JEOPARDY CLAUSE, WHICH PROHIBITS THE STATE FROM SUBJECTING A DEFENDANT TO SUCCESSIVE CAPITAL SENTENCING PROCEEDINGS, SHOULD APPLY TO SUCCESSIVE NON-CAPITAL SENTENCE ENHANCEMENT PROCEEDINGS.

Amici respectfully submit that this Court should limit its holding in *Bullington v. Missouri*, 451 U.S. 430 (1981) to cases involving the death penalty. Amici respectfully request that this Court use the instant case as the opportunity to hold that *Bullington* does not obtain in cases where the death penalty is not involved. Amici respectfully submit that non-capital sentencing enhancement proceedings should, for former jeopardy purposes, be governed by this Court's holding in *North Carolina v. Pearce*, 395 U.S. 711 (1969) and its progeny. In *North Carolina v. Pearce* this Court held, in essence, that the Fifth and Fourteenth Amendments' Double Jeopardy Clause does not prohibit a defendant from receiving on retrial an enhanced sentence of imprisonment that is greater than the enhanced sentence the defendant received at his initial trial.

In support of their assertion that *North Carolina v. Pearce* and its progeny should obtain in non-capital sentence enhancement proceedings where the state is resentencing an accused habitual offender after he has successfully attacked the sufficiency of the state's proof of his status as an habitual offender on appeal or in a post-conviction proceeding, the amici contend that this Court should not expand the scope of the Double Jeopardy Clause, as the Eighth Circuit Court of

Appeals did in the instant case, lest such an expansion of former jeopardy principles operate to the long term disadvantage of accused habitual offenders in criminal cases. This sort of prudential reason for restricting the reach of the Double Jeopardy Clause has been recognized by this Court in one of its former jeopardy precedents, *Tibbs v. Florida*, 457 U.S. 31 (1982). In *Tibbs*, this Court declined to expand the scope of the prohibitions embodied in the Double Jeopardy Clause, in part, because of a fear that such an expansion would operate to the long term detriment of defendants in criminal cases.

In *Tibbs v. Florida*, this Court held that the Double Jeopardy Clause does not bar retrial of a defendant in a criminal case after the defendant's initial conviction is set aside by a state appellate court on the ground that the guilty verdict returned against the defendant in his initial trial was against the weight of the evidence. In the course of this Court's analysis of this issue, this Court set forth a public policy rationale in support of its conclusion. In essence, this public policy rationale amounted to this Court's recognition that state lawmakers might not be inclined to give defendants the benefit of obtaining a new trial on the basis of an "against the weight of the evidence" argument on appeal if the consequence of a successful such argument by a defendant was a former jeopardy-based prohibition to the defendant's retrial. This Court stated its point in this regard as follows:

> We note that a contrary rule, one precluding retrial whenever an appellate court rests reversal on evidentiary weight, might prompt state legislatures simply to forbid those courts to reweigh the evidence. Rulemakers willing to permit a new trial in the face of a verdict supported by legally sufficient evidence may be less willing to free completely a defendant convicted by a jury of his peers. Acceptance of Tibbs' double jeopardy theory might also lead to restrictions on the authority of trial judges to order new trials based on their independent assessment of evidentiary weight. Although Tibbs limits his argument to appellate reversals, his contentions logically apply to a trial judge's finding that a conviction was against the weight of the evidence. (Citations omitted) Endorsement of Tibbs' theory, therefore, might only serve to eliminate practices that help shield defendants from unjust convictions.

Tibbs, 457 U.S. at 45 n.22.

The instant case generally resembles *Tibbs v. Florida* in that in *Tibbs* and in the instant case this Court is being asked to extend the reach of the Double Jeopardy Clause into an area of state statutory criminal procedure where this Court has never before explicitly stated that former jeopardy principles apply. The amici respectfully submit that this Court should apply the public policy rationale, noted above, in *Tibbs v. Florida* to the instant case, given that Missouri's non-capital sentence enhancement procedure, and that of other states, employs a specific feature that works to the defendant's benefit that is not required by Fourteenth Amendment's Due Process Clause. This statutory feature of Missouri's non-capital sentence enhancement procedure, which is shared by other states' non-capital sentencing procedures, is the statutory requirement that the State prove the defendant's status as an habitual or persistent offender by proof beyond a reasonable doubt.[1] The Fourteenth Amendment's due process

[1] *By statute, Missouri requires itself to prove a defendant's status as a persistent offender beyond a reasonable doubt. Mo. Rev. Stat.* § 558.021(1)(2) (1986). Other states have the same statutory requirement for proof of a defendant's status as an habitual or persistent offender by

requirement of proof beyond a reasonable doubt does not apply (nor does any lesser burden of proof) to the factors that a state chooses to require itself, by statute, to prove in order to establish a defendant's status as an habitual or persistent offender. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91-3 (1986); *see also* Model Penal Code § 7.07 at 293-98 (Off. Draft 1985); *see generally* Annotation, *Rule of Reasonable Doubt as Applicable to Proof of Previous Conviction for Purpose of Enhancing Punishment*, 79 A.L.R. 1337 (1932).

Of course, the fact that the legislature in Missouri and the legislatures in other states have chosen to impose on their respective states the burden of proving a defendant's status as an habitual offender by proof beyond a reasonable doubt benefits defendants charged with being habitual or persistent offenders. This statutory requirement benefits such defendants at trial and on retrial. The amici submit that this particular statutory requirement — proof of the defendant's status as an habitual offender beyond a reasonable doubt — is of greater benefit to defendants in criminal cases than the statutory procedure at issue in *Tibbs v. Florida* — the ability of an appellate court to reverse a criminal conviction on the basis that the verdict was against the weight of the evidence — because proof beyond a reasonable doubt is a much more difficult standard for a state to satisfy than the lower standard of proof by the weight of the evidence.

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[1]Continued

proof beyond a reasonable doubt. *See, e.g.*, Ark. Code Ann. § 5-4-504(a) (1987) (Arkansas); Colo. Rev. Stat. Ann. § 16-13-103(4)(b) (West repl. 1986) (Colorado); Ind. Code Ann. § 35-38-1-2(c)(2) (West Cum. Supp. 1992) (Indiana); Md. Code Ann. Crim. Law art. 27, § 643B(d) (1987) (Maryland); Mich. Stat. Ann. § 28.1085 (Callaghan 1986 rev. vol.) (Michigan); and Tenn. Code Ann. § 40-35-108(c) (1990) (Tennessee); *see also* Arthur Campbell, Law of Sentencing § 7:5 n.24 (2d ed. 1991).

The amici submit that just as expansion of the reach of the Double Jeopardy Clause to cover an appellate court's estimate of the weight of the evidence might cause lawmakers to prohibit appellate courts from making such estimates, (*Tibbs*, 457 U.S. at 45 n.22), the expansion of the ambit of the Double Jeopardy Clause, as the Eighth Circuit Court of Appeals did in the instant case, to the state-imposed statutory requirement of proof of a defendant's status as an habitual or persistent offender beyond a reasonable doubt might cause state lawmakers to react by lowering this statutory requirement to the level permitted by this Court's interpretation of the Fourteenth Amendment's Due Process Clause, which, at most, is proof by a preponderance of the evidence. *See McMillan v. Pennsylvania*, 477 U.S. at 91-3.

State lawmakers might well amend their non-capital sentence enhancement proceedings to lessen or to remove altogether the burden of proof on the state if this Court uses the instant case as the vehicle to expand the reach of the Double Jeopardy Clause by extending its holding in *Bullington v. Missouri* to such sentencing proceedings. State lawmakers might well make such amendments in their non-capital sentence enhancement procedure once they realize that if they amend their sentence enhancement procedure by lessening or removing the states' burden of proof, the states will escape the reach of the Double Jeopardy Clause and will be able to punish an accused habitual offender on retrial if the offender succeeds in persuading a court on direct appeal or in a post-conviction proceeding that the state had failed at the defendant's initial trial to prove his status as an habitual offender. Such statutory amendments by state lawmakers would remove non-capital sentence enhancement procedures from the ambit of the Double Jeopardy Clause because the presence of the requirement of proof beyond a reasonable

doubt was identified by the majority of this Court in *Bullington v. Missouri* as the key factor that placed the sentencing procedure at issue there within the ambit of the Double Jeopardy Clause. *Bullington*, 451 U.S. at 438, 441, 445-46. *Accord State v. Hennings*, 670 P.2d 256, 260 (Wash. 1983); *cf.* Wash. Rev. Code § 9.94A.030(12)(a); § 9.94A.110 (1992 rev. code).

One could hardly be surprised if state lawmakers react in the manner just described in order to vindicate the public interest in seeing that the guilty are punished. This public interest has been previously recognized by this Court as a factor to be considered in former jeopardy jurisprudence. *See, e.g., United States v. Scott*, 437 U.S. 82, 92 (1978) (". . . the public interest in insuring that justice is meted out to offenders.") and *Burks v. United States*, 437 U.S. 1, 15 (1978) (". . . society maintains a valid concern for insuring that the guilty are punished.") To be sure, state legislatures are not composed of criminal law scholars but state lawmakers will, if this Court expands the scope of the Double Jeopardy Clause in the instant case by affirming the decision of the United States Eighth Circuit Court of Appeals, quickly see that a state can avoid the prohibitions contained in the Double Jeopardy Clause with regard to non-capital sentence enhancement procedure by lowering or removing the burden of proof that the State imposes on itself by statute. Doubtlessly, the states will not give away to the Fifth and Fourteenth Amendments' Double Jeopardy Clause that which — proof of a criminal defendant's status as an habitual offender by proof beyond a reasonable doubt — is not demanded by the Fourteenth Amendment's Due Process Clause.

II.

WHETHER THIS COURT'S DECISION IN BULLINGTON V. MISSOURI, 451 U.S. 430 (1982) EXPANDS THE PROTECTION AFFORDED BY THE DOUBLE JEOPARDY CLAUSE CONTRARY TO THE ORIGINAL INTENT OF THE CLAUSE AS ARTICULATED BY THE TERMS OF THE CONSTITUTION AND BEYOND THE TRADITIONAL PROTECTION OF THE CLAUSE.

The amici agree with and adopt the petitioners' argument that this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981) expands the protection afforded by the Double Jeopardy Clause contrary to the original intent of the Clause as articulated by the framers of the Constitution and beyond the traditional protections of the Clause. For the reasons discussed herein, the amici respectfully submit that this Court should overrule the majority opinion in *Bullington*.

First, the applicability of the Double Jeopardy Clause should not depend upon the procedures employed in sentencing. As the petitioners correctly note, Justice Powell, in his dissent from the majority opinion in *Bullington* stated that any distinction between the Missouri capital sentencing scheme and those employed in *United States v. DiFrancesco*, 449 U.S. 117 (1980); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973); *North Carolina v. Pearce*, 395 U.S. 711 (1969); and *Stroud v. United States*, 251 U.S. 15 (1919), the leading opinions which hold that the imposition of a greater sentence upon retrial is constitutionally permissible, are "immaterial for purposes of the Double Jeopardy Clause." *Bullington v. Missouri*, 451 U.S. at 448 n.2 (Powell, J., dissenting). The amici contend that Justice Powell was correct.[2]

[2]Justice Powell was joined in his dissent by Chief Justice Burger, Justice White, and Justice Rehnquist.

In deciding the applicability of the Double Jeopardy Clause, the statutory characteristics of the sentencing proceeding or its resemblance to the guilt/innocence phase of a capital murder trial should not be the controlling factors of such an inquiry. Rather, as the dissent in *Bullington* correctly noted, "the question is whether the *reasons* for considering an acquittal on guilt or innocence as absolutely final apply equally to a sentencing decision imposing less than the most severe sentence authorized by law." *Id.* at 450. However, the traditional "reasons" or principles underlying the Double Jeopardy Clause, i.e., the enhanced possibility of conviction, and the repeated and prolonged anxiety placed upon the defendant, are not valid concerns in either the capital or non-capital sentencing contexts. Indeed, this Court has held that "[t]he possibility of a higher sentence [has been] recognized and accepted as a legitimate concomitant of the retrial process." *Id.* at 451 [quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973)]. The dissent interpreted this prior ruling to mean that "[t]he possibility of a higher sentence is acceptable under the Double Jeopardy Clause, whereas the possibility of error as to guilt or innocence is not, because the second jury's sentencing decision is as 'correct' as the first jury's." *Id.*

It is clear that such an occurrence does not violate the Double Jeopardy Clause in the non-capital context. *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Moon v. Maryland*, 398 U.S. 319 (1970); *North Carolina v. Rice*, 404 U.S. 244 (1971); *Colten v. Kentucky*, 407 U.S. 104 (1972); *United States v. DiFrancesco*, 449 U.S. 117 (1980). Given the number and magnitude of substantive and procedural safeguards, which this Court has determined are mandated by the Eighth and Fourteenth Amendments, the sentence of death should not be treated differently than any other statutorily author-

ized sentence. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Profitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Enmund v. Florida*, 458 U.S. 782 (1982); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *McCoy v. North Carolina*, 494 U.S. 433 (1990); *Lankford v. Idaho*, 500 U.S. ___, 111 S.Ct. 1723 (1991); and *Dawson v. Delaware*, 503 U.S. ___, 112 S.Ct. 1093 (1992). Correspondingly, the possibility of receiving the sentence of death upon retrial after a previous sentence of life without parole should be as with any other sentence — a "legitimate concomitant of the retrial process." *Bullington v. Missouri*, 451 U.S. at 451 [quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973)] (Powell, J. dissenting).

Second, the above argument is bolstered by the fact that individual States are indeed constitutionally permitted to enact procedures substantially and sometimes radically different from those employed in *Bullington*. *See Graham v. Collins*, ___ U.S. ___, 113 S.Ct. 892 (1993); *see also Lowenfield v. Phelps*, 484 U.S. 231 (1988). Given the number of varying procedures which are constitutionally permitted, the petitioners correctly note that the application of the Double Jeopardy Clause should not turn solely upon the procedures employed by the individual states. The Double Jeopardy Clause should be given a more universal and comprehensive application unobscured by numerous piecemeal exceptions and qualifications.

Third, even if the focus of an inquiry as to the applicability of the Double Jeopardy Clause to the sentencing phase of a capital murder trial should center upon the specifics of the procedure employed and its statutory resemblance

to the guilt/innocence phase, the mere presence of uniform standards or factors, such as aggravating and mitigating circumstances and the statutorily mandated weighing process, should not, in and of themselves, be dispositive of the issue. As the majority correctly noted, the procedure employed in *United States v. DiFrancesco*, 449 U.S. 117 (1980) required a specific showing of additional factors aimed at proving the defendant was a "dangerous special offender." *Bullington*, 451 U.S. at 440-41. Regardless of the distinction drawn by the majority, it is clear that the mere presence of standards employed to channel the jury's discretion do not in and of themselves invoke the protection of the Double Jeopardy Clause. They should have no more significance in the capital sentencing context.

The same is true of the other constitutionally required limitations which are placed upon the capital sentencing jury's discretion. Should the applicability of the Double Jeopardy Clause truly turn upon the number of choices offered to the jury? It is clear that society mandates few punishments it considers appropriate to recompense an offense as serious as capital murder. Simply put, a wide range of possible sentences is neither available nor appropriate in the context of a capital offense. The mere fact that the capital sentencing jury is faced with fewer choices than its non-capital counterpart should be of no significance.

Finally, with regard to the jury's limited discretion, the *Bullington* dissent correctly noted that a sentence of life does not always indicate a failure of proof upon the part of the State. For example, the jury in *Bullington* was specifically instructed that it had the unfettered discretion to reject a death sentence even if it found the existence of overwhelming aggravating circumstances which outweighed all evidence offered in mitigation and justified a sentence of death.

Bullington v. Missouri, 451 U.S. at 434-435. This factor, alone, undermines the majority's reasoning that the jury's imposition of a life sentence necessarily implies that the State failed to introduce sufficient evidence to support a sentence of death. Therefore, the majority's total reliance upon the sufficiency of the evidence exception established in *Burks v. United States*, 437 U.S. 1 (1978) is misplaced, at least when applied on a wholesale basis with no articulated exceptions. Even when there is no failure upon the State's part with regard to its evidentiary burden, the majority opinion in *Bullington* prohibits resentencing. The majority's reasoning does not account for this situation nor does it allow for the number of possible variations of procedure noted above. The petitioners properly contend that the majority opinion in *Bullington* stretches the limit of the Double Jeopardy Clause too far.

The amici agree with the petitioners' contention that, while a sentence of death is certainly severe and non-reversible, and, correspondingly, deserving of numerous constitutional protections, it should be no different than any other sentence in the context of the Double Jeopardy Clause. A defendant facing retrial with the possibility of life or a large number of consecutive sentences for multiple terms of years is, for all practical purposes, in the same position as the defendant facing death. While there are numerous differences, both philosophically and procedurally, as a base consideration, a multiple offender defendant facing the possibility of, for example, 150 years in prison is no different than the defendant facing death. *See generally* Jacques Barzun, *In Favor of Capital Punishment, in* The Death Penalty in America 154-65 (Hugo Adam Bedau ed., 1964). The only difference is the timing. Each will spend the remainder of his life in prison. There is no reason the non-capital defendant should be treated differently. Pursuant to the long established

line of cases preceding *Bullington*, the defendant facing 150 years can be retried and receive the same, or if possible, a greater sentence without any violation of the Double Jeopardy Clause. There should, likewise, be no violation when the capital defendant receives a greater sentence upon retrial. As a practical matter, should the capital defendant who receives a life sentence be afforded greater protection than the non-capital defendant who receives multiple life terms? Should the procedural aspects of the capital sentencing procedure truly be sufficient justification for such a disparity? The amici contend that they should not.

CONCLUSION

The amici adopt and agree with the petitioners' arguments and respectfully suggest that this Court overrule its holding in *Bullington v. Missouri*, 451 U.S. 430 (1981) or, in the alternative, limit its holding in *Bullington* to death penalty cases.

Respectfully submitted,

WINSTON BRYANT
Attorney General of Arkansas

BY: CLINT MILLER
Senior Assistant Attorney General
and KYLE R. WILSON
Assistant Attorney General
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, ARKANSAS 72201
(501) 682-3657

Attorneys for Amici